



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2004

Ms. Florence R. Upton
Assistant City Attorney
City of San Antonio
P. O. Box 839966
San Antonio, Texas 78283-3966

OR2004-8528

Dear Ms. Upton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210753.

The City of San Antonio (the "city") received a request for certain records regarding a named police officer. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by a representative of the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that some of the submitted information appears to have been obtained pursuant to a grand jury subpoena. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the information at issue is in the custody of the San Antonio Police Department (the "Department") as agent of the grand jury, it is not subject to disclosure under chapter 552. *Id.* at 4. However, to the extent that this information is not in the custody of the Department as agent of the grand jury, it is subject to disclosure under chapter 552. In that event, we address your claims for this information, as well as for the remaining submitted information.

Section 552.101 of the Government Code excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. You state that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that a city's civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).¹ *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to a police officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to a police officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You represent that the submitted information is maintained in the Department's internal personnel file of the officer in question pursuant to section 143.089(g). Based on this representation, we find that the submitted information is confidential pursuant to section 143.089(g) of the Local Government Code, and it must be withheld under section 552.101 of the Government Code.²

We note, however, that the submitted information contains an investigation, Internal Affairs case number 02-03-025, that did result in discipline under chapter 143. Therefore, a copy of this investigation must be placed, in its entirety, in the civil service commission file regarding the involved officer. *Abbott v. City of Corpus Christi*, 109 S.W.3d at 122 (“the fact that the City's police department chooses to also maintain records on investigations and

¹Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

²We note that section 143.089(g) requires a police department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee. You state that the city has done so.

complaints that result in disciplinary action does not operate to relieve the department of the duty to forward *all* information relating to a sustained disciplinary action to the civil service commission for placement in the subsection (a) personnel file”) (emphasis in original). Records that must be maintained in the civil service file are subject to release under chapter 552 of the Government Code unless an exception to disclosure applies. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the common law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Further, we note that a portion of Internal Affairs case number 02-03-025 relates to allegations of sexual harassment. Pursuant to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the identities of witnesses to and victims of alleged sexual harassment are protected by the common law privacy doctrine and must be withheld. However, section 552.023 of the Government Code grants a special right of access to a person or a person’s authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person’s privacy interests. Therefore, the requestor has a special right of access to the information related to the police officer in question and the city may not withhold this information in this instance. We have marked the information in Internal Affairs case number 02-03-025 that is protected by common law privacy and must be withheld under section 552.101 of the Government Code.

Additionally, section 552.117(a)(2) of the Government Code excepts the home address and telephone number, social security number, and family member information of a peace officer³ regardless of whether the officer made an election under section 552.024 of the Government Code. We note that a former spouse does not constitute a family member for purposes of section 552.117(a)(2). Also, pursuant to section 552.023 of the Government Code, the requestor has a special right of access to the personal information of the officer in question, and it must be released to him. In regard to another peace officer in Internal Affairs case number 02-03-025 whose personal information is at issue, in most cases, the city would be allowed to withhold only the personal information itself. In this instance, however, in order to grant a special right of access to the requestor and protect the section 552.117 interest of this officer, we conclude that the city must withhold the identifying information of this officer we have marked under section 552.117(a)(2) of the Government Code. We have also marked the personal information of other officers in Internal Affairs case

³“Peace officer” is defined by article 2.12 of the Code of Criminal Procedure.

number 02-03-025 that must be withheld under section 552.117(a)(2) of the Government Code as well.

In summary, to the extent that the information at issue is in the custody of the Department as agent of the grand jury, it is not subject to disclosure under chapter 552. To the extent that it is not so maintained, it is subject to the Public Information Act ("Act") and may be withheld only if an exception under the Act is shown to apply. With the exception of the information we have marked under sections 552.101 and 552.117 of the Government Code, Internal Affairs case number 02-03-025 must be released.⁴ The remaining submitted information must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

Finally, you ask this office to issue a previous determination regarding information maintained in the Department's internal personnel files. We decline to issue such a determination at this time. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

⁴We emphasize that because portions of the information to be released pursuant to section 552.023 are confidential with respect to the general public, if the city receives a future request for this information from an individual other than the requestor or officer at issue, the city should again seek our decision.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/krl

Ref: ID# 210753

Enc: Submitted documents

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